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DEC 18 2009

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re

Martha Jean Barigian,
Debtor.

Case No. 08-10115-B-7

James E. Salven, Chapter 7
Trustee,

Plaintiff,

Adv. Proceeding No. 08-1271

DC No. KDG-1

v.

Lori Manweiler,

Defendant.

**MEMORANDUM DECISION REGARDING PLAINTIFF'S
REQUEST FOR DISCOVERY SANCTIONS**

This Memorandum Decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata and claim preclusion.

Connie M. Parker, Esq., appeared on behalf of the chapter 7 trustee/plaintiff, James E. Salven (the "Plaintiff").

Douglas V. Thornton, Esq., appeared on behalf of the defendant, Lori Manweiler (the "Defendant").

Before the court is a discovery dispute arising out of two contentious adversary proceedings.¹ Plaintiff filed this adversary

¹This adversary proceeding is related to, and the issues are almost identical to the issues in, adversary proceeding number 08-1273. The underlying factual allegations in

1 proceeding to recover moneys allegedly paid by the Debtor on account
2 of a pre-petition loan obligation owed to the Defendant. The Plaintiff
3 filed this motion to compel the Defendant to respond to some of his
4 discovery requests (the "Discovery Motion"). The Discovery Motion
5 was granted by order dated September 16, 2009. Under submission is
6 Plaintiff's request for sanctions (the "Sanction Request"), *i.e.*, an award
7 of attorney's fees and costs incurred in having to bring the Discovery
8 Motion. For the reasons set forth below, the Sanction Request will be
9 granted.

10 This Memorandum Decision contains findings of fact and
11 conclusions of law required by Federal Rule of Civil Procedure 52
12 (made applicable to this adversary proceeding by Federal Rule of
13 Bankruptcy Procedure 7052). The court has jurisdiction over this
14 motion pursuant to 28 U.S.C. § 1334 and General Orders 182 and 330
15 of the U.S. District Court for the Eastern District of California. This is
16 a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O).

17 **Background.**

18 Prior to the bankruptcy, the Debtor, Martha Barigian, operated a
19 business known as Parimex International ("Parimex"). It appears that
20 the Debtor, through Parimex, was heavily involved in real estate
21 investment. The Debtor filed a petition under chapter 13 in January
22 2008. The Debtor's schedules list 15 parcels of real property and 83

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24 both adversary proceedings are virtually the same. The defendants are represented by the
25 same counsel. Both adversary proceedings were consolidated for discovery purposes.
26 The Plaintiff propounded identical discovery requests in each adversary proceeding and
27 received virtually identical responses. The Plaintiff's discovery motion was filed in both
28 adversary proceedings.

1 loan transactions secured by liens against the various properties. One
2 of the scheduled secured obligations is owed to defendant Lori
3 Manweiler in the amount of \$100,000 (the "Manweiler Loan"). The
4 schedules state that the Manweiler Loan is secured by a "2006 Deed of
5 Trust - duplex." No other information is given regarding the collateral
6 for the Manweiler Loan. On March 17, 2008, after numerous
7 objections were filed to the Debtor's chapter 13 plan, the case was
8 converted to chapter 7 on the chapter 13 trustee's motion. Plaintiff,
9 James E. Salven was appointed the chapter 7 trustee.

10 This adversary proceeding was filed on December 22, 2008.
11 The Plaintiff seeks to recover from the Defendant an unspecified
12 amount of the interest payments made by the Debtor on account of the
13 Manweiler Loan. The Plaintiff alleged, *inter alia*, that the interest
14 payments were usurious and avoidable under California law.

15 On March 11, 2009, the Plaintiff's counsel served on
16 Defendant's counsel a request for production of documents and a set of
17 interrogatories. At the request of the Defendant, the Plaintiff agreed to
18 extend the time for the Defendant's response to June 22, 2009.

19 Plaintiff's interrogatory no. 2 went to the core of the adversary
20 proceeding. It asked the Defendant to "Identify all payments made by
21 [the Debtor] to YOU from 2003 to present." In response, Defendant
22 objected on the grounds of "tax payers' privilege" and refused to
23 produce any details or supporting information:

24 Objection. Tax payers' privilege. Other than the
25 return schedules, Responding Party does not have
26 documents showing the amount of interest
27 received from the subject loans, however, the
28 amount of interest paid was \$11,250. This
Responding Party does not have copies of the

1 checks received from Martha Barigian or Parimex
2 International, LTD. Additionally, Martha Barigian
3 or Parimex International, LTD, did not issue
4 payment receipts or Form #1099s.

5 Plaintiff's request for production of documents no. 3 asked the
6 Defendant to identify and produce any documents evidencing payments
7 made by the Debtor on account of the Manweiler Loan including
8 receipts, ledgers and spreadsheets. Again, the Defendant objected on
9 the grounds of "tax payers' privilege" and declined to produce any
10 documents. On August 14, 2009, after Plaintiff's counsel made a bona
11 fide effort to meet and confer with Defendant's counsel regarding these
12 discovery requests, the Plaintiff filed the Discovery Motion. In
13 response, the Defendant acknowledged that she had located
14 "documentation showing payments" and agreed to produce those
15 "documents" in a supplemental response. Accordingly, the Discovery
16 Motion was granted.

17 The Plaintiff's attorney requests an award of \$1,360 (8 hours x
18 \$170 per hour) for time spent preparing the Discovery Motion in two
19 adversary proceedings (*see* footnote 1, *supra*) and appearing at the
20 initial hearing. The Defendant objects to the Sanction Request and
21 argues, without supporting evidence, that she timely produced all of the
22 documents and information that were available to her with the original
23 discovery response.² In short, the Defendant contends that the
24 Discovery Motion was unnecessary. However, she offers no

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26 ²The Defendant's responsive pleading is not supported by a declaration from
27 either the Defendant or her counsel. Neither the Discovery Motion, nor the Defendant's
28 response were served on the Defendant.

1 explanation why the additional documentation could not have been
2 located and produced with her original discovery response, or after the
3 attorneys met and conferred prior to the filing of the Discovery Motion.

4 **Analysis.**

5 **Applicable Law.**

6 Discovery in an adversary proceeding is governed by the Federal
7 Rules of Civil Procedure. FRCP 37(a) (made applicable to this
8 adversary proceeding by FRBP 7037), provides for a monetary award
9 of legal fees and costs to a party who must file a motion to compel
10 disclosure or discovery, and is successful. Fed.R.Civ.P. 37(a)(4)(A)
11 provides in pertinent part:

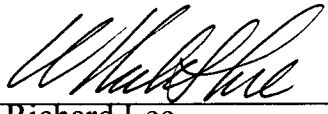
12 If the motion is granted or if the disclosure or requested
13 discovery is provided after the motion was filed, the court shall,
14 after affording an opportunity to be heard, require the party or
15 deponent whose conduct necessitated the motion or the party or
16 attorney advising such conduct or both of them to pay to the
17 moving party the reasonable expenses incurred in making the
18 motion, including attorney's fees, unless the court finds that the
19 motion was filed without the movant's first making a good faith
20 effort to obtain the disclosure or discovery without court action,
21 or that the opposing party's nondisclosure, response, or objection
22 was substantially justified, or that other circumstances make an
23 award of expenses unjust.

19 The Discovery Motion was successful. The fact that the
20 Defendant began producing some "supplemental documents" after the
21 Discovery Motion was filed does not vitiate the sanction issue. Rule
22 37(a)(4)(A) states that fees and costs *shall* be awarded, even if the
23 discovery is produced after the Motion was filed.

24 The pertinent question is whether the Discovery Motion was
25 necessary and whether the moving party made a good faith effort to get
26 the discovery without court intervention. The court is persuaded that
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1 the Defendant's failure to diligently search for and locate the
2 "supplemental documents" necessitated the Discovery Motion. The
3 court is also persuaded that Plaintiff's attorney made a good faith effort
4 to obtain the discovery responses without court action. Ergo, attorney's
5 fees *shall* be awarded and the Sanction Request will be granted. Since
6 the Sanction Request relates to two adversary proceedings, one-half of
7 the requested attorney's fees will be awarded in this adversary
8 proceeding.

9 Dated: December 18, 2009

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12 W. Richard Lee
13 United States Bankruptcy Judge
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